NO. 57042-4-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

THREE TREE ROOFING COMPANY,

Respondent,

v.

DEPARTMENT OF LABOR AND INDUSTRIES,

Appellant.

BRIEF OF APPELLANT

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I. INTRODUCTION

A company that entrusts its jobsites to crew leaders with a history of disobeying safety rules without monitoring their behavior cannot show that it effectively enforces its safety program. The Board of Industrial Insurance Appeals correctly found that when Three Tree Roofing put two crew leaders with prior fall safety violations in charge of a crew of employees with prior fall safety violations, it was foreseeable that the crew would not follow safety protocols. On substantial evidence review, the superior court improperly reversed.

Three Tree Roofing admits that its roofing crew violated the Washington Industrial Safety and Health Act when it worked on a steep-pitched roof of up to 20 feet with no fall protection. It asserted that the violation occurred as a result of unpreventable employee misconduct. But, it admitted that they were a "rogue crew" (CP 188–89), and employees reported that despite the "rogue crew" having prior violations by the forepersons and other crew members, the crew might see

someone from the employer once a month. But this defense only applies when a violation is an isolated occurrence and unforeseeable, which it was not here.

The Board rejected this defense, finding that Three Tree Roofing did not effectively enforce its safety program in practice, an element of the defense. The superior court incorrectly reversed when it ignored the substantial evidence standard of review.

Because substantial evidence supports a finding of ineffective enforcement, this Court should reverse the superior court and affirm the Board.

II. ASSIGNMENTS OF ERROR[1]

1. The Department assigns error to the superior court's finding of fact 1.6. The fall protection violation was

[1] In a WISHA appeal, this Court reviews the Board's findings, not the superior court's findings, for substantial evidence. *Frank Coluccio Constr. Co. v. Dep't of Lab. & Indus.*, 181 Wn. App. 25, 35, 329 P.3d 91 (2014); RCW 49.17.150(1). Although the Department assigns error to the superior court's findings that it believes are incorrect, they are irrelevant. *See Campbell v. Dep't of Soc. & Health Servs.*, 150 Wn.2d 881, 898–99, 83 P.3d 999 (2004) (in review of

foreseeable and was not due to unpreventable employee misconduct, so the superior court's finding to the contrary is incorrect.

2. The Department assigns error to the superior court's finding of fact 1.7. The superior court incorrectly found that "[t]he employer had work rules and equipment designed to prevent fall protection hazards, these rules were adequately communicated to its employees, the employer took steps to discovery and correct violation of its safety rules, and effectively enforcement of its safety program."

3. The Department assigns error to the superior court's finding of fact 1.10. Three Tree Roofing did not establish all of the elements of the unpreventable employee misconduct defense for the fall protection violation (item 1-1), so the superior court's finding to the contrary is incorrect.

4. The Department assigns error to the superior court's conclusion of law 2.2. Three Tree Roofing violated WAC 296-155-24609(7)(a), this was a serious violation and was not the result of unpreventable employee misconduct, so the superior court's conclusion to the contrary is incorrect.

5. The Department assigns error to the superior court's conclusion of law 2.4. The fall protection violation (item 1-1) should be affirmed, not vacated.

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administrative decisions, findings of superior court are not reviewed).

6. The Department assigns error to the superior court's paragraph 3.1 and 3.2 in its judgment and order. The superior court incorrectly reversed the Board's decision and vacated Violation Item 1-1.

III. ISSUE

An employer cannot show unpreventable employee misconduct if a company's procedures were not effective in practice, and there is an inference of lax enforcement of those safety procedures if forepersons participate in the violation. Three Tree Roofing put two forepersons with prior fall safety violations in charge of a crew who also had prior fall violations and did not sufficiently monitor them, and an inspector found the whole crew with no fall safety protection. Does substantial evidence support the Board's finding that Three Tree Roofing's procedures were not effective in practice?

IV. STATEMENT OF THE CASE

A. A Safety Inspector Saw a Five-Person Roofing Crew, Including Both Crew Leaders, Working on a Steep-Pitched Roof with No Fall Protection

In September 2019, safety inspector Jessica Wilke was driving around Buckley, Washington, looking for construction hazards. CP 145, 149. While driving, she saw a man working on a second story roof of a two-story house without any rope or lifeline attached to a harness he was wearing. CP 149, 312

(Ex 3, p. 2). She estimated the second story roof to be about 20 feet high. CP 154, 320 (Ex 4, p. 6), 337 (Ex 5, p. 6).

Wilke drove to the house to investigate. CP 150. She saw a Three Tree Roofing van parked in the house's driveway. CP 150. She saw two other workers on first floor roof wearing harnesses but not tied off to anything. CP 151–52. The first floor roof was over 11 feet high. CP 155. The roof had a steep pitch exceeding a pitch of 4/12, meaning that, under an applicable safety regulation, employees had to use fall protection when exposed to falls of more than 4 feet. CP 161; former WAC 296-155-24609(7)(a) (2016).[2]

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[2] In September 2019, former WAC 296-155-24609(7)(a) was the regulation that applied to protect workers on steep-pitched roofs:

> Fall protection on steep pitched and low pitched roofs. (a) Steep pitched roofs. Regardless of the work activity, you must ensure that employees exposed to fall hazards of 4 feet or more while working on a roof with a pitch greater than 4 in 12 use one of the following: (i) Fall restraint system. Safety monitors and warning line systems are prohibited on steep pitched roofs;

Besides seeing that the crew did not use fall protection, Wilke also noticed that a ladder the crew used to access the roof extended only about one and a half feet above the roof surface. CP 181; *see also* CP 153, 311 (Ex 3, p. 1), 313 (Ex 3, p. 3). The applicable safety regulation generally requires a ladder to extend at least three feet above the landing surface. *See* WAC 296-876-40030(1).[3]

Three Tree Roofing had a five-person crew at the Buckley worksite. CP 238, 260, 286, 454 (Ex 10, p 18). The crew worked full-time. CP 291. Misael Sanchez and Denis Sanchez shared responsibility as crew leaders, with Misael

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(ii) Fall arrest system; or (iii) Positioning device system.

The current regulation for steep pitched roofs can be found at WAC 296-880-20005(6).

[3] "You must make sure a ladder used to access an upper level has the side rails extended at least three feet (0.9 m) above the landing surface if the ladder length permits." WAC 296-876-40030(1). The rule provides some exceptions, not at issue here. WAC 296-876-40030(2).

Sanchez serving as the "primary" crew leader. CP 238–39. The crew had two crew leaders because Misael Sanchez was better with communication and Denis Sanchez had more roofing experience. CP 238–39.

B. The Primary Crew Leader Told the Inspector He Had Never Enforced Safety Rules

Wilke spoke with Misael Sanchez, the primary crew leader, on the worksite. CP 151, 159. He told her that the pitch of the roof was 5/12, which was steeper than a 4/12 pitch, meaning that fall protection was required at four feet. CP 162; former WAC 296-155-24609(7)(a). She observed that Misael Sanchez was violating the safety rules by not wearing fall protection. CP 159.

As the crew leader, Misael Sanchez's duties included assigning work on the jobsite, conducting walk-around safety inspections, filling out fall protection work plans, and enforcing safety. CP 159. Misael Sanchez told Wilke he had the authority

to enforce safety. CP 159. But he told her that he "has never used" his authority to enforce safety:

> Q: And in this specific case, the lead, Mr. Sanchez, did he have authority to enforce safety?
>
> A: He told me that he did, yes.
>
> Q: And did he participate in violating the rules?
>
> A: He did. He told me that, although he has that authority, *he has never used it*, and in this case, during this inspection he was violating the rules with everyone else.

CP 159 (emphasis added).

Misael Sanchez also told Wilke that he had set up the ladder that did not extend three feet over the roofline. CP 182. He said he "thought it was ok because he secured it." CP 324. Wilke explained that Misael Sanchez's admission showed her that he did not fully understand the requirement in WAC 296-876-40030(1) that the ladder had to extend three feet above the roofline. CP 182.

Wilke also spoke with the other crew leader, Denis Sanchez. CP 158. He told her that the crew may or may not wear their fall protection on a jobsite depending on how many "stories there are on the home." CP 158. This concerned Wilke because it showed "they didn't take the pitch of the roof into consideration" when determining whether to use fall protection, even though for steep-pitched roofs with more than a 4/12 pitch, fall protection begins at four feet. CP 158; former WAC 296-155-24609(7)(a).

Wilke observed that the whole roofing crew—five in total—was exposed to a fall hazard. CP 163; *see also* CP 316 (Ex 4, p. 2), 320 (Ex 4, p. 6), 544–48 (Ex 13, pp. 6–10). Because they were exposed to falls of over 10 feet from the first and second story roofs onto the gravel and concrete surface below, Wilke explained that permanent disability or death could reasonably be expected if they fell. CP 154, 164.

C. The Company Owner Admitted to the Inspector That There "Was a Problem" with This Crew

Wilke also called Neil Haugen, Three Tree Roofing's co-owner, from the worksite. CP 151, 155, 232. Haugen told Wilke that he knew the fall protection requirements. CP 155. He told Wilke that he provided training for employees, and that "he thought this was a problem just with this crew" as "they had been written up previously." CP 155.

Haugen asked Wilke how he enforced his company's safety program, including whether he did random site inspections as part of the enforcement. CP 156, 160. He told her "that there is about a 20 percent chance they would stop by a site randomly." CP 156; *accord* 160. He explained "that it was hard to run a small business and be out checking on compliance." CP 156. Employees told Wilke "they might see someone, maybe, once a month." CP 188.

D. Three Tree Roofing Had Two Fall Protection Safety Violations in the Previous Fifteen Months, Including One Involving the Same Crew Leaders

Wilke investigated whether Three Tree Roofing had any violations in the previous three years, and she found that the company had two violations in the preceding 15 months. CP 167, 299 (Ex 1, p. 1), 307 (Ex 2, p. 1). The first violation occurred in June 2018 and was for a violation of fall protection requirements at 10 feet or more. CP 167, 301 (Ex 1, p. 3). The second violation occurred in April 2019 and was a violation of fall protection required at four feet or more. CP 169, 193, 275.

The second violation in April involved the same two crew leaders. CP 540–41 (Ex 13, p. 2–3); *see also* CP 274. Two other members of the crew had also received warnings before for not using fall protection. CP 544 (Ex 13, p. 6), 546 (Ex 13, p. 8).

E. L&I Issued a Safety Citation for Fall Protection and Ladder Violations, and the Board Rejected the Company's Defense of Unpreventable Employee Misconduct

L&I issued Three Tree Roofing a citation for not having a fall protection system implemented on a steep-pitch roof (violation item 1-1), a violation of former WAC 296-155-24609(7)(a), and another citation for not having the ladder extending three feet above the roof surface (violation item 2-1), a violation of WAC 296-876-40030(1). CP 24, 161, 335–36 (Ex 5, p. 1). Violation item 1-1 was a repeat serious violation and L&I assessed a $10,500 penalty. CP 341–43 (Ex 6, p. 1–3). Violation item 2-1 was a serious violation carrying a $1,000 penalty. CP 341–43 (Ex 6, p. 1–3). Three Tree Roofing appealed to the Board. CP 73.

At the Board, Three Tree Roofing did not contest that the safety violations occurred. CP 24, 37; *see also* CP 551. Instead, it argued that the violations occurred as a result of

unpreventable employee misconduct, an affirmative defense. CP 37.

Unpreventable employee misconduct is an affirmative defense that the employer must prove. *Wash. Cedar & Supply Co. v. Dep't of Lab. & Indus*., 119 Wn. App. 906, 911–12, 83 P.3d 1012 (2003). Under RCW 49.17.120(5)(a), the employer must establish each of the following elements:

> (i) A thorough safety program, including work rules, training, and equipment designed to prevent the violation;
> (ii) Adequate communication of these rules to employees;
> (iii) Steps to discover and correct violations of its safety rules; and
> (iv) Effective enforcement of its safety program as written in practice and not just in theory.

Wilke testified about why Three Tree Roofing did not establish the defense. CP 159–61. She explained that it had not proved the last two elements—steps to discover violations of safety rules and effective enforcement of the safety program in practice. CP 160–61, 188.

For the third element, Wilke relied on Haugen's comment that "he has a business to run, and he can't be out there verifying compliance all the time." CP 188. So "he might stop by 20 percent of the time to check on" the crew. CP 188. Notably to Wilke, though, employees told her "they might see someone, maybe, once a month." CP 188. That indicated to Wilke that the roofing crew "needed a little more supervision." CP 188.

Wilke also relied on Haugen's characterization of his crew as a "rogue crew" that had been written up. CP 188. But, she noted that Haugen did not keep a close eye on the crew because he failed to "make any further attempt to check on this rogue group that he already knew there was a problem with." CP 189. Although Haugen was aware of the issues with the crew, he provided no documentation at the time of inspection showing Three Tree Roofing took action against this crew, except for disciplining them after L&I previously found them committing a safety violation. CP 189, 200.

While Wilke acknowledged that there was evidence Three Tree Roofing used a walk-around job safety inspection checklist for random site inspections, she testified that a person performing a walk-around job inspection and a random site inspection for compliance would be looking for different things. CP 190–91, 265. Namely, Wilke explained that some of the inspection forms the company submitted, if used for random checks, do not "mention fall protection, which is at the heart of the violation." CP 206; *accord* CP 219; *see also* CP 504–06 (Ex 11, pp. 35–37), 509–11 (Ex 11, p. 40–42), 514–16 (Ex 11, pp. 45–47).

Wilke testified that when she told Misael Sanchez that the site walk-around safety inspection list that he completed was incorrectly filled out, he said "that was the way he always did it." CP 204. The inspection list for the day of the citation shows that the jobsite had a floor opening even though there was none; that the crew was using a guardrail system, even though they were not; and that the crew was using "a warning

line system, positioning device, fall arrest, and fall restraint," even though they were not. CP 204; *see also* CP 214, 454 (Ex 9, p. 18).

Haugen testified that every new employee would go through a first day orientation, employees would get 10–15 minute safety meetings every two weeks, and crews would have safety meetings before each job. CP 239–40, 277.

When asked whether Wilke's testimony that a Three Tree Roofing crew would have about 20 percent chance of random safety inspection, co-owner Haugen said "I would say, no." CP 272.[4] Furthermore, Haugen said the "overall percentage of time, at least, once a month, if not more." CP 272–73.

Three Tree Roofing has what Haugen called a "three strikes" disciplinary policy. CP 279–80. The written policy

[4] At the time of the violation, Three Tree Roofing had between four and six roofing crews. CP 234. Haugen testified that Three Tree Roofing was performing between one and two random safety inspections a week at the time of the violation, but the records Three Tree Roofing presented at hearing do not back up that assertion. CP 270–71.

requires each offense to be documented with a note placed in the employee's file, with a third offense permitting termination:

- First offense will result in a minimum of a verbal warning with a note placed in the employees file.

- Second offense may result in a suspension without pay with a note placed in the employees file.

- Third offense may result in immediate termination.

CP 352 (Ex 7, p. 7).

Haugen testified that Three Tree Roofing does not document verbal warnings much:

> Q. Now, for your verbal warnings, do you document those?
>
> A. Verbals not as much. It's -- you know, it's one of those things, where, a lot of times, we are in the field, and I don't know -- I don't want to get too much into it, but prideful guys.
>
> It's a culture thing, prideful guys, and writing the guy up, one of the first things is, can be seen as going after somebody, and it's more, like, we want to coach them up on the first go. Make sure they -- come along

side, make sure everybody knows where we are going kind of thing.

Q: Understanding that it's not necessarily your practice to always document that, do you document it sometimes?

A: Yes. If it's something where we feel like it's, they are not going to get it otherwise, then yes, but we are very careful who he [sic] hire. Part of the reason I was so disappointed with this thing.

We are very careful who we hire, and these guys that work here, I have known -- most of these guys, I have known for ten years plus. And so, a correction like that carries a lot of weight. We are very positive workplace, and it's not usually necessary, but yes, we have, I think, a couple of times.

CP 280–81.

Although Haugen testified he was shocked that the crew had two fall safety citations within a five-month period, he did not consider the cited crew a "rogue crew" at the time of the September 2019 citation. CP 273–74. After the citation in April 2019, Haugen testified the crew received full reorientation and more random safety checks; he said that he could not remember

if those extra random visits were presented into evidence but he believed they were "once a week for a while thereafter." CP 275. But the documents Three Tree Roofing presented show no increase of random inspections on this crew after the April 2019 inspection: documents show one in May 2019, and one in June 2019. CP 276, 490–93 (Ex 11, p. 21–24). Even more so, the citation at issue here occurred on the edge of Three Tree Roofing's service area, that is "as far as [the company] would go," making it harder for Three Tree Roofing to do a random check. CP 236, 292–93.

F. The Board Upheld the Citation, but the Superior Court Reversed, Finding Three Tree Roofing Established Unpreventable Employee Misconduct for the Fall Protection Violation

The Board affirmed L&I's citation and rejected the defense. CP 8, 29. The Board's finding of fact 11 explained that Three Tree's safety program was not effective in practice because the company had recent fall protection citations, and

because the two crew leaders responsible for enforcing safety were not wearing fall protection and had previous violations:

> The employer's safety program was not effective in practice. The employer had two prior fall safety violations within 15 months of the violations at issue in this appeal. All of the workers working at the inspected job site were working without fall protection at the time of the inspection, including two crew leaders who had responsibility for enforcing the safety program. This was the third fall protection violation for the two crew leaders and one other worker. The three workers had been told of their first two violations, and told that a third violation would result in termination, but that did not stop them from working without the required fall protection.

CP 29 (FF 11).

Three Tree Roofing appealed to the superior court. CP 1–3. The court affirmed the ladder citation but concluded that Three Tree Roofing established the unpreventable employee misconduct defense for the fall protection violation.[5] CP 590. In its oral ruling, the court explained that "other than this

[5] Because the superior court affirmed the ladder citation, this brief focuses on the fall protection violation.

particular crew," the company's general safety plan was "workable" and that the employer was not reporting a lot of on-the-job injuries:

> I think interpreting the act of the inspector and then the decision that was made basically has created what amounts to a strict liability requirement, which basically says, if we do find there is a violation and then that in and of itself is proof that all you have is a paper program, but it's not actually being followed.
>
> Here, the evidence is other than this particular crew, the general safety plan was a workable plan. It was being followed, and because of that, we don't have a lot of injuries that are being reported from this employer. I think, given the amount of work that this employer is doing, and the fact that we're not talking about folks that are being injured on the job, I think speaks to the effectiveness of this safety program.

RP 17–18. L&I appeals.

V. STANDARD OF REVIEW

In WISHA appeals, this Court reviews the Board's decision based on the record before the agency, and the superior court's findings are irrelevant. *See Campbell*, 150 Wn.2d at 898–99; *Frank Coluccio*, 181 Wn. App. at 35; *Ostrom*

Mushroom Farm Co. v. Dep't of Lab. & Indus., 13 Wn. App. 2d 262, 271, 277, 463 P.3d 149 (2020) (reversing superior court in WISHA case and affirming substantial evidence supported Board's findings). The Administrative Procedure Act does not apply. RCW 34.05.030.

The Board's factual findings are conclusive if supported by substantial evidence, when considering the whole record. RCW 49.17.150(1); *Mowat Constr. Co. v. Dep't of Lab. & Indus.*, 148 Wn. App. 920, 925, 201 P.3d 407 (2009). Evidence is substantial if it is sufficient to convince "a fair-minded person of the truth of the declared premise." *Mowat Constr.*, 148 Wn. App. at 925.

Under substantial evidence review, courts do not reweigh the evidence. *Potelco, Inc. v. Dep't of Lab. & Indus.*, 7 Wn. App. 2d 236, 243, 433 P.3d 513 (2018); *Ostrom*, 13 Wn. App. 2d at 271–72 (noting that substantial evidence can support an agency's findings even if the court could draw "inconsistent conclusions from the evidence"). Rather, courts view the

evidence and its "reasonable inferences in the light most favorable to the prevailing party" at the Board—here, the Department. *Frank Coluccio*, 181 Wn. App. at 35. The court gives substantial weight to the Department's interpretation of WISHA. *Id.* at 36.

VI. ARGUMENT

Substantial evidence supports the Board's finding about ineffective enforcement. First, when supervisors commit violations, as here, there is an inference of lax of enforcement. *Cent. Steel, Inc. v. Dep't of Lab. & Indus.*, 20 Wn. App. 2d 11, 32, 498 P.3d 990 (2021) (quoting *Mountain States Tel. & Tel. Co.*, 9 BL OSHC 2151, 1981 WL 18811, at *2 n.2 (Occ. Safety & Health Rev. Comm'n No. 13266, 1981)), *review denied*, 199 Wn.2d 1020 (2022). Second, past violations for the same violation show the violation is foreseeable, and Three Tree Roofing had two other fall protection violations in the past 15 months. *See BD Roofing, Inc. v. Dep't of Lab. & Indus.*, 139 Wn. App. 98, 111, 114, 161 P.3d 387 (2007). Third, the

company owner acknowledged this was a "rogue" crew but the company checked on them infrequently, just once a month or less. This was not an idiosyncratic event: none of the crew wore fall protection and all but one had prior fall safety violations.

The Washington State Constitution and RCW 49.17.010 mandate safety protections for all Washington workers. Const. art. II, § 35; RCW 49.17.010; *Martinez-Cuevas v. DeRuyter Bros. Dairy, Inc*., 196 Wn.2d 506, 525, 475 P.3d 164 (2020). Courts construe WISHA statutes "liberally to achieve the purpose of providing safe working conditions for workers in Washington." *Bayley Constr. v. Dep't of Lab. & Indus.*, 10 Wn. App. 2d 768, 781, 450 P.3d 647 (2019).

Viewing the evidence in the light most favorable to the Department, substantial evidence supports the Board's decision that a whole crew, including two forepersons, were working on a steep-pitch roof without fall protection, and the crew violation was not due to unpreventable employee misconduct. The defense of unpreventable employee misconduct does not apply

because Three Tree Roofing's safety procedures were not effective in practice. This Court should affirm the Board.

A. Substantial Evidence Supports the Board's Finding that the Safety Program Was Not Effective in Practice Where the Two On-Site Supervisors Violated the Safety Rule and Had Previous Violations

A company that entrusts its jobsites to crew leaders with a history of disobeying safety rules cannot show that it effectively enforces its safety program. The reason for this is clear: supervisors have a duty to protect employees they supervise. When a supervisor participates in a safety violation, there is an inference of lax enforcement of safety rules. *Cent. Steel*, 20 Wn. App. 2d at 32 (quoting *Mountain States*, 1981 WL 18811, at *2 n.2); *Potelco, Inc. v. Dep't of Lab. & Indus.*, 194 Wn. App. 428, 438, 377 P.3d 251 (2016).

An employer cannot claim the unpreventable employee misconduct defense if the violation is "foreseeable and preventable." *BD Roofing*, 139 Wn. App. at111 (quoting *Wash. Cedar*, 119 Wn. App. at 913). Here, Three Tree Roofing

continued to assign two crew leaders who each had multiple prior fall protection safety violations to supervise a working crew, and the company checked on them "maybe, once a month." CP 188. These conditions show lax enforcement of the company's safety program, not effective enforcement. It was entirely foreseeable there would be another fall protection violation under these conditions. So because substantial evidence supports that Three Tree Roofing did not effectively enforce its safety program, its unpreventable employee misconduct defense fails.

1. A supervisor's participation in a safety violation is evidence that the company does not effectively enforce its safety program in practice

The Board correctly found that Three Tree Roofing's violation of the fall protection rules did not result from unpreventable employee misconduct. To succeed on this claim, an employer must prove: "(1) a thorough safety program (including work rules, training, and equipment designed to prevent the violation); (2) adequate communication of these

rules; (3) steps to discover and correct violations; and (4) effective enforcement of its safety program as written in practice and not just in theory." *Pro-Active Home Builders, Inc. v. Dep't of Lab. & Indus.*, 7 Wn. App. 2d 10, 20, 465 P.3d 375 (2018); *accord* RCW 49.17.120(5)(a). To show effective enforcement of a safety program in practice, "the employer must prove that the employee's misconduct was an isolated occurrence and was not foreseeable." *Pro-Active Home Builders*, 7 Wn. App. 2d at 20 (citing *Wash. Cedar*, 119 Wn. App. at 913).

The defense applies only in "situations in which employees disobey safety rules despite the employer's diligent communication and enforcement." *See Asplundh Tree Expert, Co. v. Dep't of Lab. & Indus.*, 145 Wn. App. 52, 62, 185 P.3d 646 (2008). Evidence submitted by an employer to establish the defense must include more than testimony; evidence must include documentation supportive of its claims that it took steps to discover and correct violations. *See BD Roofing*, 139 Wn.

App. at 112–13 (citing *Legacy Roofing, Inc. v. Dep't of Lab. & Indus.*, 129 Wn. App. 356, 119 P.3d 366 (2005)).

Under Washington law, "[s]upervisor participation in or failure to enforce a safety rule weighs against the defense of unpreventable employee misconduct." *Potelco*, 194 Wn. App. at 437 (citations omitted). "[T]he fact that a foreman would feel free to breach a company safety policy is strong evidence that implementation of the policy was lax." *Cent. Steel*, 20 Wn. App. 2d at 32 (quoting *Mountain States*, 1981 WL 18811, at *2 n.2); *see also Potelco*, 194 Wn. App. at 438 (finding foreperson's breach of company safety policy "raises an inference of 'lax enforcement and/or communication' of [the employer's] safety policy"). The proof of the defense "is more rigorous and . . . difficult to establish since it is the supervisor's duty to protect the safety of employees under his supervision." *Potelco*, 194 Wn. App. at 437 (quoting *Archer–Western Contractors, Ltd.*, 15 BL OSHC 1013, 1991 WL 81020, at *5 (Occ. Safety & Health Rev. Comm'n No. 87-1067, 1991)).

2. The two crew leaders for Three Tree Roofing violated the fall protection rules, showing the company's enforcement was not effective in practice

There is no dispute here that both of Three Tree Roofing's on-site supervisors violated the fall protection safety rules. Neither used fall protection on a steep-pitched roof, even though failure to do so exposed them and the employees they supervised to serious injury or death. CP 164. Under well-established case law, the crew leaders' noncompliance with safety rules is strong evidence that Three Tree Roofing's enforcement of its safety program was lax and not effective in practice. *See Cent. Steel*, 20 Wn. App. at 32; *Potelco*, 194 Wn. App. at 438.

For example, the 2016 *Potelco* Court found that substantial evidence supported that the employer did not establish the fourth element of the unpreventable employee misconduct defense—effective enforcement of the safety program in practice—where the foreperson participated in the violation:

> Despite his authoritative position, [the foreman] failed to ensure that his crew established an [equipotential zone][6] before beginning work on the transmission line. Indeed, knowing that no [equipotential zone] had been established, [the foreman] himself actively participated in the work. [The foreman's] involvement raises an inference of "lax enforcement and/or communication" of Potelco's safety policy.

Potelco, 194 Wn. App. at 438.

The same is true here: the two crew leaders actively participated in the roofing work knowing no fall protection was in place. This raises the inference of lax enforcement, not "an isolated occurrence [that] was not foreseeable," as required under the unpreventable employee misconduct defense. *See Pro-Active Home Builders*, 7 Wn. App. 2d at 20 (citing *Wash. Cedar*, 119 Wn. App. at 913). The crew leaders' active participation in the violation is substantial evidence supporting

[6] An equipotential zone is required under WISHA rules when de-energizing high voltage lines in order to protect against the risk of electrocution. *Potelco*, 194 Wn. App. at 432.

the company did not effectively enforce its safety program in practice.

3. The primary crew leader said he never enforced safety rules, and both crew leaders had violated safety rules in the past

But as bad as it was for the two supervisors not to follow safety rules that exposed their subordinates to serious injury and death, the primary crew leader here told the inspector he *never* enforced safety rules, even though he had that authority:

> Q: And in this specific case, the lead, Mr. Sanchez, did he have authority to enforce safety?
>
> A: He told me that he did, yes.
>
> Q: And did he participate in violating the rules?
>
> A: He did. He told me that, although, he has that authority, *he has never used it*, and in this case, during this inspection he was violating the rules with everyone else.

CP 159 (emphasis added). This is not lax enforcement of safety rules—this is no enforcement. Entrusting a jobsite to a crew leader who admits that he never uses his safety enforcement authority leads to the foreseeable consequence of safety

violations. It is no surprise that safety violations will occur in such situations. Indeed, they are predictable, not "isolated occurrences." That Three Tree Roofing empowered a crew leader who abdicated any safety enforcement responsibility adds to the substantial evidence that Three Tree Roofing's safety policy was not effective in practice.

Though the company's owner testified that the company did a "full reorientation" of this crew after the April 2019 violation (CP 275), Misael Sanchez's candid admission that he never enforced safety rules is a fair inference that this reorientation was ineffective. So the Court should reject Three Tree Roofing's reliance on this "reorientation" to support the idea that effectively enforced its safety plan. CP 555.

A company does not effectively enforce its safety program when it tolerates a "rogue crew." Further evidence to support the Board's finding is Haugen's comment to the inspector on the day of the inspection that "this was a problem just with this crew." CP 155. The owner told the inspector they

were "a rogue crew" that had just been written up but, as the inspector testified, "he didn't make any further attempt to check on this rogue group that he already knew there was a problem with." CP 188–89. This is more evidence that the company did not effectively enforce its safety program.

Adding to the abundant evidence supporting ineffective enforcement, the company inspected this crew infrequently—"maybe, once a month"—despite its poor safety record. CP 188.[7] Infrequent unannounced inspections is evidence that an employer does not effectively enforce its safety program in practice. *Potelco*, 194 Wn. App. at 436–38 (explaining that the

[7] Haugen testified that the company's crews were inspected "once a month, if not more," although he suggested at other points that the company checked on this crew more frequently. CP 273, 275–76. The Board as factfinder could have disregarded self-serving testimony about more frequent inspections and instead believed the employees' account of being checked on "maybe, once a month." CP 188; *see Ramos v. Dep't of Lab. & Indus*., 191 Wn. App. 36, 40–42, 361 P.3d 165 (2015) (holding that substantial evidence supported a trial court finding where the fact-finder did not believe the testimony of the claimant, despite no evidence from the Department refuting the claimant's testimony).

"same evidence" that supported the Board's finding on the third element of the defense, including the lack of frequent unannounced inspections, supported the fourth element). Haugen explained he did not do more random safety inspections because "he had a business to run, and he couldn't be out there checking on them all the time." CP 156.

But business needs cannot trump safety. When a company knows that an employee has violated safety rules, an inference arises "that the employee may require additional monitoring" to comply with safety rules. *Pro-Active Home Builders*, 7 Wn. App. 2d at 21. Yet Three Tree Roofing inspected this full-time crew "maybe, once a month," substantial evidence that its enforcement of its safety program was ineffective. *See* CP 188, 291. Though Haugen testified that the company inspected the crew "once a week for a while thereafter" (CP 275), there was only documentary evidence of one inspection between April 2019 and September 2019 (CP 490–93 (Ex 11)), and his testimony should be disregarded on

substantial evidence review where there is contrary evidence that random inspections occurred "maybe, once a month." CP 188. Further, testimony alone is not sufficient for a company to prove under the defense that they are taking actions to correct safety violations. *See, e.g.*, *BD Roofing*, 139 Wn. App. at 112–13; *Legacy Roofing*, 129 Wn. App. at 364–66.

Finally, even more evidence of ineffective enforcement is the site walk-around safety inspection list that Misael Sanchez filled out the day of the citation. CP 203–04, 454 (Ex 10, p. 18). Though the list was meant to identify a specific worksite's fall hazards and how the crew would protect against them, the list included hazards that didn't actually exist on the worksite (a floor opening) and fall protection methods that the crew wasn't actually using (a guardrail system, a warning line system, positioning device, fall arrest, and fall restraint). CP 203–04, 213–14, 454 (Ex 10, p. 18). Misael Sanchez said "that was the way he always did it" when the inspector pointed out it was inaccurate. CP 204. Where a supervisor identifies nonexistent

hazards and says the crew will be protected against them—that is, when its jobsite safety inspection documentation is essentially a sham—an employer cannot show it effectively enforces its safety program.

B. Substantial Evidence Supports the Board's Finding That the Safety Program Was Not Effective in Practice Where Three Tree Roofing Had Recent Violations for the Same Safety Issue

Substantial evidence also supports the Board's finding that Three Tree Roofing did not effectively enforce its safety program in practice because the company had two other fall protection safety violations within just 15 months of the current violation. *See* CP 299–310 (Exs 1–2). This recent past history shows that the September 2019 violation was not "an isolated occurrence" that was unforeseeable, as the affirmative defense requires. *See Pro-Active Home Builders*, 7 Wn. App. 2d at 20 (citing *Wash. Cedar*, 119 Wn. App. at 913).

Evidence "of prior violations does not absolutely bar use of the unpreventable employee misconduct defense; it is merely

evidence that the employee conduct was foreseeable and preventable." *Wash. Cedar*, 119 Wn. App. at 913; *accord BD Roofing*, 139 Wn. App. at 111; *Potelco*, 7 Wn. App. 2d at 249. The superior court misapplied the law when it suggested that reliance on past citations is "strict liability." *See* RP 17. It is not. It is evidence that the employee conduct is foreseeable because it has happened before. *See BD Roofing*, 139 Wn. App. at 111; *Legacy Roofing*, 129 Wn. App. at 367 (rejecting the argument that reliance of previous violations as proof of foreseeability "eviscerat[es]" the defense). That's just common sense.

Here, Three Tree Roofing had two other fall protection safety violations within the previous 15 months. CP 138, 140, 299–310 (Exs 1–2). This is evidence that its employees' "conduct was foreseeable and preventable." *BD Roofing*, 139 Wn. App at 111 (quoting *Wash. Cedar*, 119 Wn. App. at 913). Fall protection violations were a "recurring and foreseeable problem" for Three Tree Roofing, just as they were in *BD*

Roofing. 139 Wn. App at 114. An employer shows effective enforcement of a safety program only if the violation is an isolated occurrence and not foreseeable, which Three Tree Roofing cannot show where it had violated fall protection rules recently and repeatedly, failing to guard against the most frequent hazard its employees faced. *See BD Roofing*, 139 Wn. App. at 111.

It was even more foreseeable that this particular crew would violate fall protection rules. Haugen's reaction when the inspector told him about the violation illuminates this: "he thought this was a problem just with this crew." CP 155. He knew this crew had a poor safety record, making a violation foreseeable. Four out of five crewmembers had been found working on roofs without proper fall protection on prior occasions. CP 273–74, 544–48 (Ex 13, pp. 6–10). Before this incident, all but one crewmember had at least one verbal warning for violating fall protection rules. CP 544–48 (Ex 13, pp. 6–10). Three Tree Roofing cannot show that this was an

"isolated occurrence"—as the defense requires—where almost all of the crewmembers were repeat offenders.

Contrary to Three Tree Roofing's arguments, "constant supervision" was not the only way to have prevented the violation here. CP 555. First off, the evidence is that the company checked on the crew "maybe, once a month" (CP 188), a far cry from "constant supervision." Certainly, doing unannounced inspections on a known problematic crew more than "maybe once a month" would have made the company's assertion of the defense more plausible. Three Tree Roofing's specter of "constant supervision" has no connection to reality where the facts show that weeks went by without the company checking on the crew.

And Three Tree Roofing could have implemented a number of alternative measures to avoid safety violations. Although Haugen testified "that it was hard to run a small business and be out checking on compliance" (CP 156), workers in Washington should expect to have safe working

conditions regardless of the size of the company employing them. Three Tree Roofing's business practices should not trump safe working conditions. Namely, Three Tree Roofing could have had proper hiring practices (Three Tree Roofing failed to show the steps it takes to hire its employees), it could have mixed the crew with employees who had a good safety record, or it could have had at least had one crew leader known to the company for following fall safety protocols.

Holding employers—such as Three Tree Roofing—to their heavy burden to establish the affirmative defense of unpreventable employee misconduct is critical to enforcing safety rules. To do otherwise creates an unacceptable public health risk contrary to the purposes of WISHA.

C. Substantial Evidence Supports the Board's Finding That the Safety Program Was Not Effective in Practice Where Three Tree Roofing Did Not Follow Its Own Disciplinary Policy

Yet more evidence of Three Tree Roofing's ineffective enforcement of its safety program is its failure to follow its own

disciplinary policy. A lack of consistent discipline for workers who violate safety rules also shows a lack of effective enforcement. *See Potelco*, 194 Wn. App. at 435–38 (finding that the company "failed to effectively enforce" its safety program on the "same evidence" that supported a failure of the third element of the defense, which included the failure to enforce its disciplinary policy).

By Haugen's own admission, Three Tree Roofing did not usually document verbal warnings, which was inconsistent with its written disciplinary policy. That policy states that a "[f]irst offense will result in a minimum of a verbal warning with a *note placed in the employees file*." CP 352 (Ex 7, p. 7) (emphasis added). But when asked if he documented verbal warnings, Haugen responded "not as much." CP 280. He explained that they "want to coach them up on the first go" and that documenting is "not usually necessary" unless the company feels the workers "are not going to get it otherwise":

Q. Now, for your verbal warnings, do you document those?

A. Verbals not as much. It's -- you know, it's one of those things, where, a lot of times, we are in the field, and I don't know -- I don't want to get too much into it, but prideful guys.

It's a culture thing, prideful guys, and writing the guy up, one of the first things is, can be seen as going after somebody, and it's more, like, we want to coach them up on the first go. Make sure they -- come along side, make sure everybody knows where we are going kind of thing.

Q: Understanding that it's not necessarily your practice to always document that, do you document it sometimes?

A: Yes. If it's something where we feel like it's, they are not going to get it otherwise, then yes, but we are very careful who he [sic] hire. Part of the reason I was so disappointed with this thing.

We are very careful who we hire, and these guys that work here, I have known -- most of these guys, I have known for ten years plus. And so, a correction like that carries a lot of weight. We are very positive workplace, and it's not usually necessary, but yes, we have, I think, a couple of times.

CP 280–81.

A company does not effectively enforce its safety program when it does not follow its own disciplinary policy, as the court in the 2016 *Potelco* case explained. *Potelco*, 194 Wn. App. at 436–38. The employer's disciplinary policy there (like Three Tree Roofing's) required that all discipline, including verbal warnings, be documented in writing. *Id.*at 436. But the company's safety coordinators admitted that the company rarely documented verbal warnings, which meant that an employee could get numerous verbal warnings, but incur no progressive discipline for repeatedly violating the same safety rule. *Id.* The court cited the company's failure to follow its written discipline policy when concluding that it did not effectively enforce its safety program in practice. *Id.* at 436—38.

The facts are identical here, showing that Three Tree Roofing's enforcement was ineffective. Its safety program said something on paper that the company did not actually do in

practice. That is the paradigmatic example of not enforcing a written safety program. "Merely showing a good paper program does not demonstrate effectiveness in practice." *BD Roofing*, 139 Wn. App. at 113 (citing *Brock v. L.E. Myers Co., High Voltage Div.*, 818 F.2d 1270, 1277 (6th Cir. 1987)). Because Three Tree Roofing did not document verbal warnings, like in the 2016 *Potelco* case, an employee could potentially get numerous verbal warnings, but incur no progressive discipline for repeating the same violation. Despite acknowledging the prevalence of safety concerns "a lot of times" when they were "in the field," Haugen could only recall a "couple of times" when the company documented verbal warnings, instead of just doing "corrections" on the job. CP 280–81. That is not effective enforcement of a safety program.

Besides its failure to apply its own disciplinary policy, Three Tree Roofing presented scant evidence of *any* disciplinary records. Besides Haugen's self-serving testimony about disciplining employees, Three Tree Roofing only

presented evidence of three verbal warnings and two written warnings to employees between the time Three Tree Roofing started in 2017 and the time of the citation in September 2019. CP 232, 539–48 (Ex 13, pp. 1–10). Notably, the two written warnings were issued to the crew leaders as a consequence of L&I catching them working on a roof without safety harnesses, not as a result of the company's own inspections. The evidence shows deficient record-keeping practices that make it hard for the company to keep track of employees' discipline records.

D. An Injury Is Not Required to Show an Ineffective Safety Program

The superior court erred when it determined that, because Three Tree Roofing did not have reported injuries and only one crew was not following safety regulations, Three Tree Roofing's safety program was effective in practice. The superior court applied an incorrect legal standard, impermissibly reweighed the evidence, and reversed the

Board's decision without taking into consideration that substantial evidence supported such decision.

Evidence is substantial if it is sufficient to convince "a fair-minded person of the truth of the declared premise." *Mowat Constr.*, 148 Wn. App. at 925. Under substantial evidence review, courts do not reweigh the evidence. *Potelco*, 7 Wn. App. 2d at 243; *Ostrom*, 13 Wn. App. 2d at 271–72 (noting that substantial evidence can support an agency's findings even if the court could draw "inconsistent conclusions from the evidence").

In its oral ruling, the court explained why it reversed the Board decision regarding the fall safety violation:

> Well, I appreciate the briefing and the argument. I don't believe that there is substantial evidence that supported a major violation. Here's what's concerning to me, is just the point that was just made. I think interpreting the act of the inspector and then the decision that was made basically has created what amounts to a strict liability requirement, which basically says, if we do find there is a violation and then that in and of itself is proof that all you have is a paper program, but it's not actually being followed.

> Here, the evidence is other than this particular crew, the general safety plan was a workable plan. It was being followed, and because of that, we don't have a lot of injuries that are being reported from this employer. I think, given the amount of work that this employer is doing, and the fact that we're not talking about folks that are being injured on the job, I think speaks to the effectiveness of this safety program.

RP 17–18.

Just because there is no evidence of reported injuries, it does not mean that the program was effective in practice. As a matter of law, a company could fail all the elements of unpreventable employee misconduct—even have no safety program—and still have no injuries. WISHA does not depend on injuries to show liability.

Similarly, just because Three Tree Roofing was having issues with one crew does not mean the program was effective in practice. Even more so, Three Tree Roofing admitted it had issues with this one crew; this shows Three Tree Roofing was aware of the systemic problems with the crew. And yet,

substantial evidence shows that Three Tree Roofing failed to check on the crew more often to prevent safety violations.[8] CP 156, 188–89, 292–93.

Also, contrary to the court's oral ruling, Three Tree Roofing was not following its own safety policy procedures. Haugen testified that Three Tree Roofing failed to properly document verbal warnings and jobsite inspections. CP 280–81.

The superior court suggests that the Board found Three Tree Roofing's safety program was not effective in practice because a crew committed a violation. The Board made no such finding. To the contrary, substantial evidence supports the Board's decision, which found that unpreventable employee misconduct is inapplicable. First, both supervisors in charge of the crew committed the same violation a few months before

[8] Although Three Tree Roofing's owner testified that the company was doing weekly checks on the crew, the documents Three Tree Roofing presented show that it was checking on the crew only once a month, a fact supported by one of the crew leaders who said that they would see someone checking on them once a month.

(safety violations by supervisors are an inference of lax enforcement of the safety regulations). Second, the violation was foreseeable because all but one crewmember had prior violations. Third, Three Tree Roofing failed to keep proper discipline records and failed to show that it performed more random inspections on the problematic crew.

The superior court decision failed to apply the correct standard of review because substantial evidence shows unpreventable employee misconduct does not apply.

VII. CONCLUSION

This Court should affirm the Board.

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RESPECTFULLY SUBMITTED this 29th day of September, 2022.

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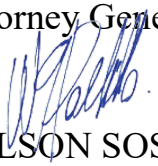

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September 29, 2022 - 4:00 PM

Transmittal Information

Filed with Court:	Court of Appeals Division II
Appellate Court Case Number:	57042-4
Appellate Court Case Title:	Three Tree Roofing Company, Respondent v The Department of L & I, Appellant
Superior Court Case Number:	21-2-07849-6

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